Supreme Court, U.S.
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No. 96-1052

In The

Supreme Court of the United States

October Term, 1996

TAK HOW INVESTMENT LIMITED,
Petitioner,

v.

RALPH M. NOWAK, ADMINISTRATOR OF THE ESTATE OF SALLY ANN NOWAK AND INDIVIDUALLY, NICHOLAS M. NOWAK, A MINOR, BY RALPH M. NOWAK, HIS FATHER AND NEXT FRIEND, AND NATHAN G. NOWAK, A MINOR, BY RALPH M. NOWAK, HIS FATHER AND NEXT FRIEND,
Respondents.

On Petition for a Writ of Certiorari to the Untied States Court of Appeals for the First Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully submit the following Brief in Opposition to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This lawsuit concerns the wrongful death claims of the widower and two children of a woman who drowned in the swimming pool of the Holiday Inn Crowne Plaza Harbour View in Hong Kong.[1] This case was originally commenced in State court and was removed by the defendant to the United States District Court for the District of Massachusetts. Following removal, the defendant filed two motions to dismiss; one, on grounds that the District Court lacked *in personam* jurisdiction and another, on grounds of *forum non conveniens*. The issues of *in personam* jurisdiction and *forum non conveniens* were separately briefed by the parties, and on April 25, 1995, the District Court heard argument on both issues. The motion to dismiss on grounds of *forum non conveniens* was denied from the bench following argument, and the motion to dismiss on grounds that the District Court lacked *in personam* jurisdiction was denied in a memorandum and order, dated August 29, 1995. (29A).[2] Following the District Court's denial of the defendant's motions to dismiss, the defendant deliberately defaulted, thereby waiving its right to a full adjudication of the facts at a

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[1] The Petitioner's Statement Of The Case for this Court omits certain material facts found by the District Court and affirmed on appeal. Accordingly, the Respondents rely on the facts set forth in the opinion of the District Court, *Nowak v. Tak How Investment Ltd.*, 899 F.Supp. 25 (D.Mass. 1995), and in the opinion of the Court of Appeals, *Nowak v. Tak How Investment Ltd.*, 94 F.3d 708 (1st Cir. 1996). Citations to those opinions refer to the opinions as reprinted in the appendix to the Petition For A Writ Of Certiorari.

[2] References to pages in the appendix to the Petition For A Writ Of Certiorari are cited as "___A."

trial.[3] On November 9, 1995, the District Court entered default judgment against the defendant, (A27), from which the appeal to the United States Court of Appeals for the First Circuit was taken. The sole basis for the appeal was the District Court's denial of the two motions to dismiss.

The Court of Appeals affirmed the District Court's decision to deny the defendant's motions to dismiss for lack of *in personam* jurisdiction and on the grounds of *forum non conveniens*.

REASONS FOR DENYING THE WRIT

The petition only presents argument on the issues raised in the first of its four "questions presented for review." Therefore, this brief responds only to those issues.

In its opinion, (3A), the Court of Appeals stated the rule of law as to "specific jurisdiction" as follows:

> [The Court of Appeals] follows a tripartite analysis for determining the existence of specific personal jurisdiction (plaintiffs do not allege general personal jurisdiction): First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state

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[3] This would include facts relating to the issue of jurisdiction. "When a court...denies a motion because the plaintiff fails to make a *prima facie* showing, a denial of the motion to dismiss is an implicit deferral until trial of the final ruling on jurisdiction." *Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 678 (1st Cir. 1992).

> activities. Second, the defendant's forum-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors, be reasonable. (8A).

This statement is consistent with numerous Supreme Court rulings since 1945.

The modern state of the rule of law pertaining to the exercise of specific jurisdiction over a defendant, consistent with the constraints imposed by the Due Process Clause of the Fourteenth Amendment, first emerged when the Supreme Court decided *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Court stated that:

> [T]o the extent that a corporation exercises the privilege of conducting activities within the state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe Co. v. Washington, 326 U.S., at 319.

Since *International Shoe*, the Supreme Court has provided consistent and ample guidance on the application of this rule of law. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1984) this Court stated that the Due Process Clause required "fair warning that a particular activity may subject [defendants] to the jurisdiction of a foreign sovereign" in order to permit defendants to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." This Court also held, in *Burger King Corp. v. Rudzewicz*, 471 U.S., at 472, that:

> [The] "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, [citation omitted], and the litigation results from alleged injuries that "arise out of or relate to" those activities [citation omitted].

And while *International Shoe Co. v. Washington*, 326 U.S., at 319 informed that "[t]he criteria by which [the Supreme Court] mark[s] the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative," *Burger King Corp. v. Rudzewicz*, 471 U.S., at 475-476 refined this approach, explaining that:

> [W]here the defendant "deliberately" has engaged in significant activities within a State, [citation omitted], or has created "continuing obligations" between himself and residents of the forum, [citation omitted], he manifestly has

> availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

In its examination of the first prong of the tripartite analysis for specific personal jurisdiction, the Court of Appeals stated that "the 'relatedness' test is one aspect of demonstrating minimum contact pursuant to *International Shoe Co. v. Washington*, 326 U.S. 310." (8A). The Court of Appeals described the relatedness requirement under the Due Process Clause of the Fourteenth Amendment as a "flexible, relaxed standard," (14A), that "focuses on the nexus between the defendant's contacts and the plaintiff's cause of action," (10A), requiring that a "meaningful link" exists between the defendant's contact with the forum and the cause of action. (15A- 16A). This analysis mirrors the Supreme Court's view that "[i]t is sufficient for purposes of due process that the suit was based on a contact which had a substantial connection with that State." *McGee v. International Life Insurance Co.*, 355 U.S. 220, 223 (1957). That is to say, "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King Corp. v. Rudzewicz*, 471 U.S., at 475. "The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112 (1986).

Observing that "in the context of a relationship between a contractual or business association and a subsequent tort, the absence of proximate cause per se should [not] always render the exercise of specific jurisdiction unconstitutional," (14A), when reviewing the Petitioner Hotel's contacts with the forum, the Court of Appeals stated:

> When a foreign corporation directly targets residents in an ongoing effort to further a business relationship, and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortious result. The corporation's own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship the corporation sought to establish, we think the nexus between the contact and the cause of action is sufficiently strong to survive the due process inquiry at least at the relatedness stage. (14A - 15A).

Again, this is simply a restatement of the Supreme Court's language in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1979):

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to

> subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.

The Petitioner's primary argument,[4] that this case presents the question left unanswered in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 415 n.10 (1984), is a red herring. The question described in footnote 10 of *Helicopteros Nacionales de Colombia, S.A.* was "left unanswered" merely because the parties to that case stipulated that specific jurisdiction was not relevant to the case. However, the question in footnote 10 is not *undecided* by the Supreme Court, as the Petitioner has implied. This question has plainly been addressed by the Supreme Court. *See, International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Hanson v. Denckla*, 357 U.S. 234 (1957); *McGee v. International Life Insurance Co.*, 355 U.S. 220 (1957); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1979); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1984); *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986).

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[4] Set forth as the first "Question Presented", page i, and argued on page 13 of the petition.

Nor, as the petition proclaims, are the various courts of appeal "hopelessly muddled,"[5] in "utter conflict and confusion,"[6] over their approach to the issue of relatedness. In its opinion, (11A-12A), the Court of Appeals explained that the Ninth and Fifth Circuits[7] apply a "but for" test for relatedness; the Sixth Circuit applies a "substantial connection" standard; and the Seventh Circuit has upheld claims that "lie in the wake of commercial activities." These are merely variations on the "substantial connection" standard recommended by the Supreme Court in *McGee v. International Life Insurance Co.*, 355 U.S., at 223; *Burger King Corp. v. Rudzewicz*, 471 U.S., at 475; and, *Asahi Metal Industry Co. v. Superior Court*, 480 U.S., at 112. As noted in the opinion of the Court of Appeals, (12A-13A), the courts in the Second, Eighth, Third and Tenth Circuits have employed a "proximate cause standard," but only for the purposes of applying State long-arm statutes. In light of abundant precedent, the courts of appeal in these Circuits will, no doubt, also apply a relatedness test derived from the Supreme Court's "substantial connection" standard when addressing the law pertaining to the exercise of specific jurisdiction. In any event, the decision of the Court of Appeals can hardly be said to be in conflict with the decisions of other United States court of appeals on this issue.

In deciding this case, the Court of Appeals properly stated and correctly applied the law pertaining to specific jurisdiction. Therefore, this Court should decline to issue the requested writ.

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[5] Page 13 of the petition.

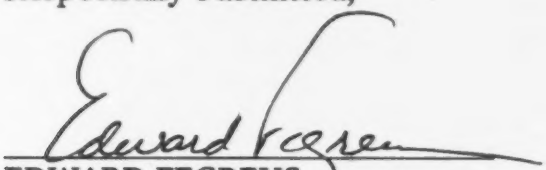
[6] Page 17 of the petition.

[7] And now the First Circuit.

CONCLUSION

For the reasons set forth above, the Respondents request that this Court decline to issue the requested writ.

Respectfully Submitted,



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